Supreme Court, U.S.
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No. 97-161

In The

Supreme Court of the United States

October Term, 1996

MASAMI AIZAWA,

Petitioner,

v.

THE SOVEREIGN STATE OF JAPAN; THE JAPANESE MINISTRY OF JUSTICE; THE JAPANESE MINISTRY OF FOREIGN AFFAIRS; THE SUPREME PROSECUTOR'S OFFICE OF JAPAN; THE ISHINOMAKI DISTRICT PUBLIC PROSECUTOR'S OFFICE; THE SENDAI HIGH PUBLIC PROSECUTOR'S OFFICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

RESPONDENTS' OPPOSITION IS NONRESPONSIVE TO THE JURISDICTIONAL AND PROCEDURAL ISSUES OF TREMENDOUS SIGNIFICANCE RAISED HEREIN UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT AND THE FEDERAL RULES OF CIVIL PROCEDURE

Respondents' Opposition to Petitioner's July 24, 1997, Petition for Writ of Certiorari is entirely nonresponsive to the jurisdictional and procedural issues of tremendous national and international significance raised in the Petition. Respondents' characterization of the Petition as a "last second 'Hail Mary' pass" unduly trivializes both Rule 54(b) of the Federal Rules of Civil Procedure, as well as the unequivocal intent of Congress in enacting the Foreign Sovereign Immunities Act (hereinafter "FSIA"), under which duly created agencies or instrumentalities of a foreign state are to be accorded a presumption of independent status. *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 627 (1983) ("*Bancec*").

With respect to Fed. R. Civ. P. 54(b), Respondents' contention on page 7 of their Opposition, that Petitioner has not raised any intercircuit conflict because he has not "point[ed] to a single court of appeals decision holding on facts similar to this case that a district court's decision was not final and appealable," is entirely without merit. Petitioner on pages 13-15 of his Petition cites a bevy of cases from other circuits holding that a district court order which disposes of fewer than all of the claims in an action, or the rights and liabilities of fewer than *all* of the parties to the action, is not a final judgment absent compliance with Rule 54(b) certification by the district court.

Here, there is no question that the district court's June 26, 1996, order of dismissal fell within the ambit of Rule 54(b) because it disposed of "the rights and liabilities of fewer than all of the parties" due to the district court's failure to dismiss the action as to the Japanese Ministry of Justice. Accordingly, Fed. R. Civ. P. 54(b) applied to the order. Because the order did not meet the mandatory certification requirements imposed by Fed. R. Civ. P. 54(b), it was not final and appealable. This ends the inquiry, and the Ninth Circuit's decision to the contrary is in direct conflict with the above-mentioned cases from other circuits cited in the Petition.

Moreover, the Ninth Circuit's decision is also in direct conflict with this court's decision in *Sears, Roebuck and Co. v. Mackey*, 351 U.S. 427, 435 (1956), where this Court made it abundantly clear that the overriding policy behind Fed. R. Civ. P. 54(b) is to provide litigants in federal court with *certainty* regarding the time for filing a notice of appeal:

> A party adversely affected by a final decision thus knows that his time for an appeal will not run against him until this [Rule 54(b)] certification has been made.

Here, the Ninth Circuit's decision, due to its failure to uphold Fed. R. Civ. P. 54(b)'s mandatory certification requirements, deprived Petitioner, a non-English speaking Japanese citizen who is unfamiliar with U.S. court procedures, of this "time for appeal" certainty to which he is entitled.

Stripped of all of its rhetoric, Respondents' argument with respect to Fed. R. Civ. P. 54(b) essentially boils down

to the following position: Because the district judge intended something, i.e., the dismissal of an action as to all of the defendants, then the Federal Rules of Civil Procedure can be ignored and the time for Petitioner's appeal began to run as of the date of the district judge's undisclosed intention to dismiss the action as to all defendants. Contrary to Respondents' position, however, intent is not the law. If it were, then this would generate massive confusion for appellate litigants in federal courts across the country. They would never know when to file a notice of appeal without first ascertaining the intent of the district judge.

Here, Petitioner was confused by the district court's June 26, 1996, order dismissing his action as to only "certain" defendants, and this confusion led him to file his notice of appeal, in a pro per capacity, early. While Respondents cite, on page 4 of their Opposition, an excerpt from the June 24, 1996, hearing on their motion to dismiss wherein the district judge informed undersigned counsel that he would provide a "definitive resolution," this is altogether nonresponsive to the fact that two days later, the district court generated substantial confusion for Petitioner by entering an order which did *not* dismiss Petitioner's action as to all named defendants and which lacked the required Fed. R. Civ. P. 54(b) certification. It was not until November 22, 1996, when the district judge denied Petitioner's motion for entry of a final judgment, that he finally made it clear that his intention had been to dismiss the action as to all parties. The burden was on the district judge, however, and not Petitioner, to either draft a clear and unambiguous order of dismissal covering all parties at the outset, or else comply with Fed. R. Civ. P.

54(b)'s certification requirements. Such a prophylactic rule is essential to the preservation of valuable appellate rights.

As to Respondents' contention that the Japanese Ministry of Justice is not a separate juridical entity under the FSIA, this is also entirely without merit. In enacting the FSIA, Congress specifically contemplated that the separate ministries of foreign sovereigns, such as Respondent the Japanese Ministry of Justice herein, would fall within the Act's broad and sweeping definition of "agency or instrumentality":

> As a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including . . . a department *or ministry* which acts and is suable in its own name. [Emphasis added].

H.Rep. No. 94-1487, 94th Cong., 2d Sess. 15-16 (1976).

Respondents' attempt to categorize the Japanese Ministry of Justice as a "political subdivision" rather than an agency or instrumentality is disingenuous. While many of the reported "agency or instrumentality" cases under the FSIA involve corporations owned by foreign sovereigns, a non-corporate organ of a foreign state also falls within the definition of agency or instrumentality. 28 U.S.C. §1603(b)(2); Also see, e.g., *Yessenin-Volpin v. Novosti Press Agency*, 443 F.Supp. 849 (S.D.N.Y. 1978) [holding that both TASS ("Telegraph Agency of the Soviet Union of the USSR Council of Ministers") and Novosti Press Agency were agencies or instrumentalities of the Soviet Union]. Here, the Japanese Ministry of Justice clearly falls within the "non-corporate organ of a foreign

state" category of foreign agencies or instrumentalities, as it discharges its own separate governmental function which is distinct from the functions of other agencies, such as Respondent the Japanese Ministry of Foreign Affairs. *Edlow International Co. v. Nuklearna Elektrarna Krsko*, 441 F.Supp. 827, 832 (D.C.D.C. 1977).

Ultimately, as in *Novosti* and *Edlow*, the issue of whether the Japanese Ministry of Justice is an agency or instrumentality of Japan under the FSIA turns upon Japanese law. However, for purposes of the narrow issue involved herein regarding the propriety of the Ninth Circuit's dismissal of Petitioner's appeal, the contents of Petitioner's pleadings are to be taken as true and are to be construed in the light most favorable to the non-moving party. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972); *Scheuer v. Rhodes*, 416 U.S. 232, 235 (1974); *Iolab Corp. v. Seaboard Sur. Co.*, 15 F.3d 1500, 1504 (9th Cir. 1994).

Because Petitioner named, pled, and served (under the applicable long-arm statute) the Japanese Ministry of Justice as a separate juridical-entity defendant, and none of this, including the service of process, has been contested by Respondents, the Japanese Ministry of Justice must be treated as a separate juridical entity for purposes of the present proceedings. We are still at the pleading stage, and this presumption has no bearing on whether or not subject matter jurisdiction exists under the FSIA for Petitioner's underlying action against Respondents.

Moreover, Petitioner specifically named the Japanese Ministry of Justice as a separate party defendant, due to the fact that under the FSIA, a judgment against one

agency of a foreign sovereign is, in many instances, not enforceable by way of execution against the property of another agency of the same sovereign. 28 U.S.C. §1610(b). Thus, due to this disparate treatment in enforceability of judgments under the FSIA, Petitioner was entitled to name the Japanese Ministry of Justice as a separate party in his complaint. Respondents' assertion on page 15 of their Opposition that the Japanese Ministry of Justice was merely "part and parcel" of the Sovereign State of Japan therefore competely ignores the special treatment Congress has accorded foreign agencies under the FSIA for purposes of enforcing judgments.

Respondent cites *Martinez v. Winner*, 771 F.2d 424, 442 (10th Cir. 1985) on page 15 of its Opposition for the proposition that the U.S. Department of Justice is not a separate juridical entity. This simply does not address the fact that under the FSIA, Congress intended separate ministries of foreign governments, such as the Japanese Ministry of Justice herein, to be treated as distinct agencies or instrumentalities. See the above quote from the FSIA's legislative history. In addition, Respondents have introduced no evidence whatsoever in the proceedings below to show that the Japanese Ministry of Justice is not an agency or instrumentality under the FSIA. Accordingly, Petitioner's treatment of it as such is deemed to be true at this stage of the proceedings. Finally, there are a substantial number of cases holding that the United States' executive departments, including The Department of Justice, are separate agencies and can be sued in their own separate capacities. See, e.g., *Spannus v. U.S. Department of Justice*, 824 F.2d 52 (D.C. Cir. 1987); *Lykins v. U.S. Department of Justice*, 725 F.2d 1455 (D.C. Cir. 1984);

Hoover v. U.S. Department of Interior, 611 F.2d 1132 (5th Cir. 1980); *Long v. U.S. Internal Revenue Service,* 693 F.2d 907 (9th Cir. 1987).

CONCLUSION

Petitioner is a non-English speaking citizen of Japan, a nation which is one of the United States' largest trading partners, and a nation which is also the United States' partner in defense by virtue of the new defense treaty signed by both sovereigns. If we as a nation desire the Japanese to treat our citizens fairly in their courts, then it is incumbent upon us to reciprocate by providing like treatment to their citizens who are involved in disputes in our courts. We must begin by following our own procedural rules, statutes, and case precedent.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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